

MOTION FILED
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No. 83-5424 (10)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

GLEN BURTON AKE,

PETITIONER,

v.

STATE OF OKLAHOMA

RESPONDENT.

**ON WRIT OF CERTIORARI TO THE
OKLAHOMA COURT OF CRIMINAL APPEALS**

**MOTION FOR LEAVE TO FILE
SUPPLEMENTAL BRIEF AND
SUPPLEMENTAL BRIEF
FOR THE PETITIONER**

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**MOTION FOR LEAVE TO FILE
SUPPLEMENTAL BRIEF**

Petitioner respectfully moves for leave to file the appended supplemental brief, addressing a question raised for the first time at the oral argument of this case.

At oral argument, several Justices raised the question whether there was an adequate and independent state ground on which one of the petitioner's constitutional claims had been rejected -- namely, that the claim had been waived

by failing to include it in petitioner's motion for a new trial. Respondent had never raised that jurisdictional issue, and petitioner's counsel was, regrettably, not prepared to address it at argument.

The appended supplemental brief shows that, under Oklahoma law, a claim of constitutional error is not waived by its failure to have been included in a motion for a new trial. This information may assist the Court in its consideration of this question.

For this reason, leave to file the appended supplemental brief should be granted.

Respectfully submitted,

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SUPPLEMENTAL BRIEF FOR THE PETITIONER

**UNDER OKLAHOMA LAW, A CLAIM
OF FUNDAMENTAL ERROR IS NOT
WAIVED BY FAILURE TO INCLUDE
IT IN A MOTION FOR A NEW TRIAL**

Although Oklahoma generally requires that claims of error in criminal cases be raised in a motion for a new trial if they are to be considered on appeal, it has always recognized an exception to this rule for "fundamental" errors.

See, e.g., Stowe v. State, 397 P.2d 693
(Okla. Crim. App. 1964):

[T]he Court has consistently held that where fundamental

error appears and justice requires, the Court of Criminal Appeals will consider such error, regardless of whether exceptions were taken in the court below, or whether such error is assigned on appeal.

Id. at 695, citing Rea v. State, 105 P. 386 (Okla. Crim. App. 1909). In Stowe, the conviction was reversed because of prejudicial comments by the trial judge, although the issue was not preserved in the motion for a new trial or in the petition in error. See also Williams v. State, 658 P.2d 499 (Okla. Crim. App. 1983) (conviction reversed because of prosecutor's improper comments although issue not raised in motion for new trial); Hux v. Murphy, 733 F.2d 737, 739 (10th Cir. 1984) (noting that Oklahoma Court of Criminal Appeals had reviewed petitioner's claim of improper jury instruction "under its 'fundamental error' rule"); Green v. State, No. F-78-163 (Okla. Crim. App. Nov. 7, 1979)

(unpublished; cited and quoted in Note, Criminal Procedure: Oklahoma's Motion for New Trial in Criminal Cases, 36 Okla. L. Rev. 888, 904 (1983)) (conviction reversed where defendant's motion to suppress evidence was improperly denied, although issue not preserved in motion for new trial or on appeal).

The same rule is applied when defense counsel fails to object at trial. See Tobler v. State, ___ P.2d ___, 55 Okla. Bar. J. 1789 (Okla. Crim. App. Sept. 10, 1984):

We note at the outset that virtually none of the instances of prejudice were objected at trial. Thus, we can only review these allegations of error if they are fundamental. . . . We will review [them] because there is no right which is more essential to an accused's defense than the right to a fair trial free from prejudice.

Id. at 1790-91 (conviction reversed where prejudicial evidence and comments admitted without objection). Accord,

Tart v. State, 634 P.2d 750 (Okla. Crim. App. 1981) (conviction reversed based on improper closing argument despite lack of objection at trial); Cobbs v. State, 629 P.2d 368 (Okla. Crim. App. 1981) (same); Lewis v. State, 569 P.2d 486 (Okla. Crim. App. 1977) (same).^{1/}

Oklahoma has defined "fundamental error" in a manner that applies precisely to the instant case:

'Fundamental errors' are those which go to the foundation of the case, or which take from the defendant a right which was essential to his defense.

Tucker v. State, 675 P.2d 459, 461 (Okla. Crim. App. 1984) (emphasis added)

1/ The exception for fundamental error is also noted in many cases where the error is held not to have been fundamental. See, e.g., Cole v. State, 647 P.2d 446, 447 (Okla. Crim. App. 1982); Garcia v. State, 639 P.2d 88, 89 (Okla. Crim. App. 1981); Hawkins v. State, 569 P.2d 490, 493 (Okla. Crim. App. 1977); Hurley v. State, 416 P.2d 967, 971-72 (Okla. Crim. App. 1966); Brown v. State, 404 P.2d 78, 81 (Okla. Crim. App. 1965).

(reversing conviction because of improper jury instructions that were not objected to).^{2/} There is thus no fair basis for a conclusion that Glen Ake's claim of constitutional error, which was raised before trial as well as on appeal, was not properly before the Oklahoma Court of Criminal Appeals.

Moreover, Oklahoma recognizes that the requirement of a motion for a new trial

is founded upon the rationale that the trial court should be given an opportunity to intelligently consider and pass upon the alleged errors prior to the rendition of the judgment and sentence. It is reasoned that if the trial court is apprised of the commission of prejudicial errors, then he [sic] will

2/ This Court has defined fundamental error along similar lines: "[I]f the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings." United States v. Atkinson, 297 U.S. 157, 160 (1936).

correctly grant a new trial,
thus obviating the necessity of
the costly expense of an
unnecessary appeal to this
Court.

Robinson v. State, 444 P.2d 845, 847
(Okla. Crim. App. 1968). Accord
McFarthing v. State, 630 P.2d 324, 325
(Okla. Crim. App. 1981) ("Since the
trial court was never given an
opportunity to rule on the matter, it
was not properly preserved for review").

It follows that where, as here, the
trial court faithfully applied state law
and could not have granted the relief
sought even if it had been requested in
a motion for a new trial, requiring such
a "patently futile" motion to be filed
serves only the illegitimate purpose of
placing pointless procedural obstacles
in the path of a criminal defendant
attempting to obtain federal review of
substantial constitutional claims.

Obstacles of that sort are "plainly inadequate to bar [this Court's] review of the federal question presented."

Douglas v. Alabama, 380 U.S. 415, 422, 423 (1965).^{3/}

CONCLUSION

For the foregoing reasons, petitioner's constitutional claim of a right to expert psychiatric assistance

3/ Appeals to the Oklahoma Court of Criminal Appeals are appeals as of right. See Okla. stat. tit. 22 § 1051 (1981); Johnson v. State, 155 P.2d 259, 260 (Okla. Crim. App. 1945). If the State arbitrarily applied or refused to apply its fundamental error rule in such appeals it would be "making the sort of 'unreasoned distinction' the United States Constitution forbids." Note, Criminal Procedure: Oklahoma's Motion for New Trial in Criminal Cases, 36 Okla. L. Rev. 888, 900 (1983), citing Williams v. Oklahoma City, 395 U.S. 458, 459 (1969). In a capital case, such arbitrary distinctions also violate the Eighth Amendment and this "Court's insistence that capital punishment be imposed fairly, and with reasonable consistency, or not at all." Eddings v. Oklahoma, 455 U.S. 104, 112 (1982).

or examination was not waived, and was therefore not disposed of upon an adequate and independent state ground of decision. This Court's jurisdiction was thus properly invoked to review petitioner's claim.

Respectfully submitted,

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